

**FILED**

August 13, 2020

**OFFICE OF  
APPELLATE COURTS**

STATE OF MINNESOTA

IN SUPREME COURT

A20-0984

In re Proposed Recall Petition to  
Request the Recall of Timothy James Walz,  
Governor of the State of Minnesota.

O R D E R

A proposed petition to recall Governor Timothy James Walz has been submitted to the Office of the Secretary of State. The Secretary of State determined that the proposed petition meets the requirements of Minn. Stat. § 211C.04 (2018), and forwarded the proposed petition to the Clerk of the Appellate Courts in accordance with that statute. The Chief Justice of the Supreme Court must then review the petition. *See* Minn. Stat. § 211C.05, subd. 1 (2018). The court issued an order allowing the petitioners and Governor Walz to submit materials in support of or opposition to the petition. They both filed such materials.

An elected state official “may be subject to recall for serious malfeasance or nonfeasance during the term of office in the performance of the duties of the office.” Minn. Stat. § 211C.02 (2018); *see also* Minn. Const. art. VIII, § 6 (stating recall can be based on “serious malfeasance or nonfeasance”).

The proposed petition challenges some of Governor Walz’s actions in response to the COVID-19 pandemic. This is the second proposed petition to recall Governor Walz

because of actions he took in response to the COVID-19 pandemic. The first proposed petition was dismissed. *See In re Walz*, No. A20-0748, Order at 11 (Minn. filed June 15, 2020).

The current proposed petition challenges Governor Walz's declaration of a peacetime emergency due to the COVID-19 pandemic. On March 13, 2020, Governor Walz issued Emergency Executive Order 20-01. In it, he determined that "the infectious disease known as COVID-19" is an "act of nature" and declared a peacetime emergency in Minnesota. This peacetime emergency has been extended every 30 days and currently remains in effect.

Following the declaration of a peacetime emergency, Governor Walz issued a series of emergency executive orders due to the COVID-19 peacetime emergency. Beginning in Emergency Executive Order 20-33, which was effective on April 8, 2020, Governor Walz declared that certain violations of his executive orders are a gross misdemeanor. Specifically, Emergency Executive Order 20-33 provided that "[a]ny business owner, manager, or supervisor who requires or encourages any of their employees to violate this Executive Order is guilty of a gross misdemeanor and upon conviction must be punished by a fine not to exceed \$3,000 or by imprisonment for not more than a year." Subsequent emergency executive orders contained this gross-misdemeanor provision and expanded it to cover "[a]ny business owner, manager, or supervisor who requires or encourages any of their employees, contractors, vendors, volunteers, or interns to violate this Executive Order." *See, e.g.*, Executive Order 20-48.

## ANALYSIS

The proposed petition makes two allegations. First, it alleges that Governor Walz “acted illegally and substantially outside the scope of the governor’s authority when he declared a Peacetime Emergency by classifying COVID-19 as an ‘Act of Nature.’ ” Second, the proposed petition alleges that Governor “Walz violated the non-delegation doctrine of the State Constitution by creating new crimes and penalties” in “executive orders” when he made “it a gross misdemeanor for owners or supervisors to encourage employees to participate in the reopening of businesses.”<sup>1</sup>

The proposed petition addresses Governor Walz’s affirmative conduct, arguing that Governor Walz exceeded his authority by concluding that COVID-19 was an act of nature and declaring a peacetime emergency in Minnesota, and by stating that certain violations of some of the emergency executive orders he issued during the COVID-19 peacetime emergency were subject to a gross-misdemeanor penalty. These allegations fall within the scope of alleged malfeasance, rather than nonfeasance. *See In re Hatch*, 628 N.W.2d 125, 126 (Minn. 2001) (noting that malfeasance “focus[es] . . . on action taken by the official,” while “nonfeasance focuses on the official’s failure to act”).

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<sup>1</sup> The memorandum filed in support of the proposed petition includes additional allegations to support the claim that Governor Walz exceeded his authority when he issued emergency executive orders during the COVID-19 peacetime emergency. Because the applicable recall statutes “limit the initial review of a proposed recall petition to what is alleged in the petition,” the Chief Justice can only consider “the grounds for recall and facts alleged in the proposed petition.” *Walz*, Order at 3 n.1. As a result, only the grounds for recall and facts alleged in the proposed petition will be considered.

“[M]alfeasance” has “five identifiable elements: 1. an intentional act; 2. that is unlawful or wrongful; 3. in the performance of the officer’s duties; 4. that is substantially outside the scope of the authority of the officer; and 5. that substantially infringes on the rights of any person or entity.” *In re Ventura*, 600 N.W.2d 714, 716 (Minn. 1999); *see also* Minn. Stat. § 211C.01, subd. 2 (2018) (defining malfeasance).<sup>2</sup>

### I.

With respect to the first element, the definition of malfeasance requires a public official’s acts to be “done intentionally.”<sup>3</sup> *Walz*, Order at 5. The relevant emergency executive orders were all signed by the Governor, approved by the Executive Council, and filed with the Secretary of State; that is, they were acts done intentionally. The proposed petition therefore alleges sufficient facts to satisfy the intentional act element of malfeasance.

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<sup>2</sup> Governor Walz argues that comity provides a basis to dismiss the proposed recall petition because some of the petitioners are involved in litigation in Stearns and Ramsey County District Courts that raise the same arguments petitioners in the proposed recall petition are making here. Comity may provide a basis to dismiss a case when there are multiple cases involving Minnesota courts with concurrent jurisdiction. *See State ex rel. Minn. Nat’l Bank of Duluth v. District Court*, 262 N.W. 155, 157 (Minn. 1935) (addressing comity when “two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction”). This court and the district courts do not have concurrent jurisdiction; the district courts have no jurisdiction to consider a proposed recall petition for a governor. *See* Minn. Stat. § 211C.05 (2018). Thus, comity does not provide a basis to dismiss the petition.

<sup>3</sup> With respect to this element, Governor Walz continues to argue that the proposed petition should be dismissed because it does not allege that he intentionally violated the law. I rejected this same argument in the first recall petition and reject it here for the same reason. *See Walz*, Order at 4–5 (explaining that the Governor was “improperly attempt[ing] to rewrite the definition of malfeasance”).

## II.

The second element—unlawful or wrongful conduct—means “conduct that is contrary to a legal standard established by law, rule or case law.” *Ventura*, 600 N.W.2d at 719. The examination of this element must “turn . . . on a substantive legal standard,” and not on merely “the reviewing justice’s . . . subjective judgment about whether certain conduct is right or wrong.” *Id.*

### A.

The proposed petition questions Governor Walz’s authority to declare a peacetime emergency due to COVID-19. The governor has express statutory authority to declare a peacetime emergency “when an *act of nature*, a technological failure or malfunction, a terrorist incident, an industrial accident, a hazardous materials accident, or a civil disturbance endangers life and property and local government resources are inadequate to handle the situation.” Minn. Stat. § 12.31, subd. 2(a) (2018) (emphasis added).

Generally, “[w]hen a statute does not define a word or phrase, [the court] construe[s] words or phrases according to their plain and ordinary meaning.” *State v. Jama*, 923 N.W.2d 632, 636 (Minn. 2019). The court may consider dictionary definitions in determining plain and ordinary meaning. *State v. Haywood*, 886 N.W.2d 485, 488 (Minn. 2016). By applying the plain meaning of both “act” and “nature,” the COVID-19 pandemic could constitute an act of nature because the disease is caused by a naturally occurring virus that is highly contagious and spreads from person to person by droplets in the air. *See American Heritage Dictionary of the English Language*, 16, 1175 (5th ed. 2018) (defining “act,” in part, as “[t]he process of doing or performing something” and

“[s]omething done or performed” and defining “nature,” in part, as “[t]he material world and its phenomena” and “[t]he forces and processes that produce and control these phenomena”).

Instead of relying on plain meaning, petitioners argue that the phrase “act of nature” is a specialized term of art that means an “act of god.” They claim, in turn, that the phrase “act of god” includes only unpreventable events caused exclusively by forces of nature, such as earthquakes, floods, and tornados. Petitioners contend that a “public health scare” does not fall within the meaning of this term of art.<sup>4</sup>

For his part, Governor Walz agrees that the phrase “act of nature” is synonymous with the phrase “act of god.” He contends, however, that the phrase “act of god” is not as narrow as petitioners claim because it also covers a variety of events outside of human control, including a pandemic. The Governor claims that other courts have routinely concluded that the term “act of god” includes a pandemic.

When interpreting a statute, “technical words and phrases and such others as have acquired a special meaning . . . are construed according to such special meaning.” Minn. Stat. § 645.08(1) (2018). It is not clear, however, that the phrase “act of nature” has acquired the narrow, specialized meaning that petitioners give it—a meaning that would

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<sup>4</sup> Petitioners claim that the Legislature intended to exclude a public health emergency from the situations authorizing a governor to declare a peacetime emergency because a bill, H.F. 4236, 91st Leg. (Minn. 2020), was introduced at the Legislature to add “public health emergency” to Minn. Stat. § 12.31, subd. 2(a), but did not pass. But we do not “attribut[e] specific legislative intent to the legislature’s failure to enact particular bills because of the myriad reasons and circumstances that can result in such inaction.” *Star Tribune Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 282 n.2 (Minn. 2004).

exclude a pandemic. The context in which the phrase is used suggests that a peacetime emergency may be declared because of a pandemic. *See State v. Schouweiler*, 887 N.W.2d 22, 25 (Minn. 2016) (explaining that “the context in which the phrase appears” is important when deciding “whether words in a statute have a technical meaning or an ordinary meaning”). Another section in the Emergency Management Act, Minn. Stat. ch. 12 (2018), expressly contemplates that a peacetime emergency may be declared because of a communicable disease. *See* Minn. Stat. § 12.39, subd. 1 (addressing the quarantine of people “infected with or reasonably believed . . . to be infected with . . . a communicable disease” when the “communicable disease is the basis for which the . . . peacetime emergency was declared”).

Moreover, Minnesota courts have not adopted a specific meaning for the phrase “act of nature” such that I can conclude that the phrase has the narrow, and well-established, meaning petitioners identify. *See Cox v. Mid-Minn. Mut. Ins. Co.*, 909 N.W.2d 540, 543 (Minn. 2018) (“A word has a special meaning if courts have ascribed a well-established and long-accepted meaning to [it].” (citation omitted) (internal quotation marks omitted)). The parties have not cited, and I have not found, a decision from this court or lower courts in Minnesota that ascribed any particular meaning to “act of nature” that is dispositive here.

Ultimately, a recall proceeding should not be the forum for resolving the statutory interpretation issue the parties’ arguments present. The recall standard is necessarily a high one, *see* Minn. Const. art. VIII, § 6 (authorizing recall only for “serious malfeasance”), and the recall process does not lend itself to resolving disputed issues of statutory interpretation such as the one presented here. *See Ventura*, 600 N.W.2d at 719 (concluding that the legal

sufficiency of a recall petition should not “turn on nothing more than the reviewing justice’s, and subsequently the supreme court’s, subjective judgment about whether the conduct is right or wrong”). Instead, to meet the recall standard, a proposed petition must allege facts demonstrating that an official’s conduct was unlawful or wrongful because it was “contrary to a legal standard *established* by law, rule, or case law.” *Ventura*, 600 N.W.2d at 719 (emphasis added).

The proposed petition fails to meet this standard. The statute, Minn. Stat. § 12.31, “does not clearly and unambiguously prohibit” Governor Walz from determining that COVID-19 is an “act of nature” and, based on that determination, declaring a peacetime emergency. *Walz*, Order at 9. And “no Minnesota court had, prior to” the declaration of the peacetime emergency, “interpreted the statute as prohibiting that conduct.” *Id.* Governor Walz’s conduct therefore was not “contrary to a legal standard established by law, rule or case law,” and is not “unlawful or wrongful” as that term has been defined in the recall context. *Ventura*, 600 N.W.2d at 719. As a result, with respect to Governor Walz’s declaration of a peacetime emergency due to COVID-19, the proposed petition does not allege facts that, if proven, would constitute malfeasance. *See Walz*, Order at 9, 11 (dismissing proposed recall petition because it failed to allege facts that, if proven, would constitute malfeasance); *Ventura*, 600 N.W.2d at 717–20 (same).

#### B.

As a separate basis for recall, the proposed petition alleges that Governor Walz acted illegally by declaring that some violations of some of the emergency executive orders that he issued during the COVID-19 peacetime emergency are subject to a gross-misdemeanor



penalty. The Emergency Management Act makes it a misdemeanor to willfully violate an emergency order issued during a peacetime emergency. Minn. Stat. § 12.45. It states that:

Unless a different penalty or punishment is specifically prescribed, a person who willfully violates a provision of this chapter or a rule or order having the force and effect of law issued under authority of this chapter is guilty of a misdemeanor and upon conviction must be punished by a fine not to exceed \$1,000, or by imprisonment for not more than 90 days.

*Id.*

Petitioners contend that the Legislature did not provide for a gross-misdemeanor penalty for violating provisions of emergency executive orders issued during a peacetime emergency. According to petitioners, it would violate the non-delegation doctrine of the Minnesota Constitution to interpret provisions in the Emergency Management Act as giving the governor the power to set the punishment for a criminal violation of an emergency executive order because it is a legislative function to prescribe the punishment for crimes. Governor Walz responds that he did not act unlawfully or wrongfully because he has a good-faith belief that provisions in the Emergency Management Act gave him the authority to prescribe a punishment other than a misdemeanor punishment for a violation of an emergency executive order issued during a peacetime emergency.<sup>5</sup> He further argues

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<sup>5</sup> The first proposed petition to recall Governor Walz asserted that the Governor did not have the statutory authority to make a violation of an emergency executive order issued during the COVID-19 peacetime emergency a gross misdemeanor. *Walz*, Order at 9–10. In dismissing that petition, I explained that provisions of the Emergency Management Act could possibly be interpreted as giving a governor the “authority in an emergency order issued during a peacetime emergency to prescribe a different punishment for violating that order.” *Id.* at 10. I also determined that there was another potential interpretation under which the “governor would have no authority to vary the penalty.” *Id.* at 10–11. But I concluded that there was no need to resolve this issue. *Id.*

that there is no violation of the non-delegation doctrine because the Emergency Management Act provides a reasonably clear policy or standard for a governor to implement when exercising authority during a peacetime emergency.

Under the non-delegation doctrine, the Legislature “cannot delegate purely legislative power to any other body, person, board or commission.” *Lee v. Delmont*, 36 N.W.2d 530, 538 (1949) (footnote omitted). The court has noted that “[t]he power to define the conduct which constitutes a criminal offense and to fix the punishment for such conduct is vested in the legislature.” *State v. Olson*, 325 N.W.2d 13, 17–18 (Minn. 1982). At the same time, the fact that “a power may be wielded by the legislature directly” does not mean it is “purely legislative power” that cannot be delegated. *Lee*, 36 N.W.2d at 538–39 (recognizing the Legislature’s authority to delegate “discretionary power” in order to deal with “complex conditions”). Delegation to the executive branch of some authority over criminal offenses has been upheld when that law contains a clear policy or standard for the executive branch to implement. *See State v. King*, 257 N.W.2d 693, 697 (Minn. 1977) (concluding that it did not violate the non-delegation doctrine for the Legislature to give the Board of Pharmacy the power to revise statutory schedules listing controlled substances that are unlawful to possess); *see also City of Richfield v. Local No. 1215, Int’l Ass’n of Fire Fighters*, 276 N.W.2d 42, 45 (Minn. 1979) (stating that while “[t]he non-delegation doctrine teaches that purely legislative power cannot be delegated,” if “a law embodies a reasonably clear policy or standard to guide and control administrative officers . . . then the delegation of powers will be constitutional”).

Just as it was with the statutory interpretation dispute discussed above, the recall proceeding is likewise not the proper forum for resolution of the parties' dispute over the application of the non-delegation doctrine. While the non-delegation doctrine is a clear standard reflected in Minnesota law, its application in the context of a peacetime emergency or an analogous context is not. *See Lee*, 36 N.W.2d at 538–39 (stating that the fact that “a power may be wielded by the legislature directly” does not mean it is “purely legislative power” that cannot be delegated). In the absence of a clear statement in Minnesota law applying the non-delegation doctrine in this or a similar context, I cannot conclude that Governor Walz’s classification of some violations of some of his executive orders as gross misdemeanors is malfeasance for purposes of the recall statute. *See Walz*, Order at 9, 11 (dismissing proposed recall petition because it failed to allege facts that, if proven, would constitute malfeasance); *Ventura*, 600 N.W.2d at 717–20 (same).

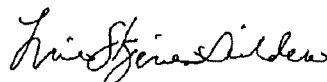
In sum, the allegations in the proposed petition for recall, even if proven, do not constitute malfeasance, and therefore there is no basis upon which to refer this matter to a special master.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the proposed petition for recall of Governor Walz be, and the same is, dismissed.

Dated: August 13, 2020

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Lorie S. Gildea".

Lorie S. Gildea  
Chief Justice